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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re BABY BOY B., a Person Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Appellant,

v.

M.L.,

Defendant and Appellant;

K.B.,

Defendant and Respondent;

C.D.,

Objector and Appellant;

BABY BOY B., a Minor,

Appellant.

G040104

(Super. Ct. No. DP013949)

OPINION

Appeals from orders of the Superior Court of Orange County, James P. Marion, Judge. Affirmed.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Appellant Orange County Social Services Agency.

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and Appellant M.L.

Arthur J. LaCilento, under appointment by the Court of Appeal, for Objector and Appellant C.D.

Niccol Kording, under appointment by the Court of Appeal, for the Minor.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Respondent K.B.

* * *

The child who is the subject of this dependency proceeding was born with drugs in his system two and one-half years ago. Each of his parents, both sets of grandparents, and his foster mother all want placement of the child. After almost 18 months from the time of detention, the juvenile court issued six- and 12-month review orders finding the parents did not receive reasonable services, extending services for six more months and refusing to remove the child from his foster placement. Two weeks later, the juvenile court summarily denied a petition by the maternal grandmother to have the child placed with her. As we explain below, we affirm the juvenile court's orders and direct it to hold an 18-month review hearing without delay.

FACTS

Baby Boy B. was born in August 2006 with a positive toxicology screen for opiates. His mother, K.B., had been addicted to opiates for 10 years and failed to obtain prenatal care. She named two men as possible fathers: D.L. and M.B. The child was

detained by Orange County Social Services Agency (SSA), and remained in the hospital with drug withdrawal symptoms until mid-October.

The mother initially appeared motivated to gain custody of the child. She began drug testing and regularly attended Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings; she also applied for a spot in a six-month inpatient rehabilitation facility. In late September, however, she was arrested for shoplifting. Drug paraphernalia was found in her purse, and she admitted she had injected heroin earlier that day. The mother was admitted to Gerry House, a residential rehabilitation facility, in late October.

The child was released from the hospital on October 16, 2006 and placed with T.C., a licensed foster care parent who lived in the same neighborhood as the maternal grandparents, in accordance with the mother's request. The child was adjudicated a dependent of the juvenile court on November 16, and custody was vested in SSA. Reunification services were ordered for the mother, which included weekly visits with the child at Gerry House.

SSA received paternity test results in mid-December, which showed that neither D.L. nor M.B. was the child's biological father. D.L. told the social worker he believed the father might be M.L., who "was intimately involved with the child's mother several times." D.L. noted that the minor had the same "reddish hair" as M.L. M.L. lived in Washington State, as did D.L.; he gave M.L.'s telephone number to the social worker.

The six-month review hearing was scheduled for April 2007. Social worker Carrie Murphy had been assigned the case sometime after December 15, 2006. She reported the mother had been discharged from Gerry House on March 1, 2007 "due to not progressing in the program." Subsequently, the mother relapsed into drug use. She was arrested for felony possession of narcotics on April 16. The mother began living with C.D., the maternal grandmother, and the step-grandfather after her discharge from

Gerry House, and the mother's weekly four-hour monitored visits with the child occurred at the home. The maternal grandmother also had weekly two-hour unmonitored visits with the child, which the mother was allowed to attend until her relapse.

Murphy spoke to M.L. on April 4 and asked him if he believed he could be the child's father. He said it was possible and agreed to undergo a paternity test. M.L. was sent formal notice of the six-month review hearing on April 26, advising him of the nature of the hearing and his right to an attorney. In her report, Murphy recommended paternity testing of M.L.; she also recommended termination of services to the mother and referral to a permanent plan selection hearing (Welf. & Inst. Code, § 366.26).¹

On April 26, the mother contested SSA's recommendation to terminate services. T.C. indicated her interest in adopting the child if reunification was not possible. The court authorized paternity testing for M.L. and continued the hearing to May 31. The hearing was again continued to June 13 at the mother's request.

Murphy reported she had called M.L. on May 3 to inform him that the court ordered paternity testing. She made two calls to SSA's service contracts office requesting information about out-of-state testing and received a response on June 6. On that date, Murphy called M.L. to explain the process, and she told him the next court hearing was scheduled for June 13. Murphy completed and submitted the referral form on June 12. When Murphy had her regular monthly visit with T.C. and the child on May 10, T.C. informed her "that she believes that the child is having small seizures and that she is waiting for a referral to . . . CHOC to have an EEG for the child." T.C. said the child was continuing to participate in occupational therapy at least once a week and was doing well.

On June 13, all parties stipulated to continue the hearing again to July 17. In the July 17 report, Murphy stated that M.L. had traveled to Orange County on June 19

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

rather than June 13; he told her someone had given him incorrect information about the court date. He met with Murphy and told her he wanted custody of the child if he was the biological father. He also told her that he “only ha[d] one arrest for a Driving under the Influence (DUI) and no other drug or domestic violence charges.” On June 22, Murphy received the paternity test information for M.L. and the child from the service contracts office. The child was scheduled to test on July 9 and M.L. on July 11. Murphy immediately called M.L. and left him a voicemail message with the information; she also sent him the information by mail.

Murphy reported the mother had been participating in her court-ordered programs and had found a job and an apartment. On July 2, however, she had a positive test for morphine. T.C. told Murphy the child’s maternal grandmother recently told her that she and the child’s mother “knew that the alleged father, [M.L.], was the child’s biological father when the child was two months old. The maternal grandmother and the child’s mother withheld Mr. L[.]’s name from the Social Services Agency until two other alleged fathers were paternity tested and ruled out as the child’s biological father.” T.C. reported the child was having temper tantrums, banging his head and biting; she planned to have him evaluated by his pediatrician.

The six-month review hearing was continued again to August 14, 2007. Murphy reported she had received paternity results on July 31 showing that M.L. was the minor’s biological father. She called him to tell him of the result and that the next hearing was on August 14. M.L. said he would attend. The maternal grandmother had contacted her to deny making the statement to T.C. that she knew who the father was when the child was two months old. “The maternal grandmother informed the undersigned that she did not wish to have any future conversations with the child’s caretaker that did not pertain to the child’s well being.” The mother told Murphy the maternal grandmother now wanted to have the child placed in her home.

Murphy reported that T.C. told her the child's occupational therapist recommended combining his separate weekly visits with the mother and the maternal grandmother into one long visit, "due to the child's period of adjustment and confusion after his visits" Murphy called the occupational therapist to confirm the information. Before she received a return call, however, Murphy changed the separate visits to one eight-hour weekly visit. A few days later, the occupational therapist left a voicemail message for Murphy, informing her that "it is 'disorganizing to the child' when he goes to several visits a week, that one all day visit with family would be better for the child and his schedule."

The father appeared at the hearing on August 14 and signed a declaration of paternity. The court found him to be the presumed father, authorized funding for out-of-state twice weekly random drug and alcohol testing, appointed counsel, and ordered monitored visits with the child. T.C. requested de facto parent standing. The six-month review hearing and the de facto parent standing request were continued to September 18, and a case plan review for the father was set for August 30.

On August 30, Murphy reported the father and the paternal grandmother had visited with the child in T.C.'s home on August 15. Murphy spoke to the father on August 28. He told her he had "located a facility in Spokane, Washington for drug testing and Parent Education classes." In response to Murphy's questions, he told her he received the DUI in July 2006 with a blood alcohol level of 0.186 and is on informal probation for two years. One of the conditions of probation was the installation of a breathalyzer in his car, which was scheduled to be removed in January 2008. The father told Murphy he "completed some alcoholic classes for his . . . DUI," and Murphy told him to "provide the Court with any certificates that he may have for said classes." Murphy proposed a case plan that included drug testing and a parenting program, and, because of the DUI, a substance abuse treatment program and AA meetings. When she discussed these case plan components with the father, he agreed.

In court on August 30, however, the father's counsel stated that the father had "declined to adopt the proposed case plan. He is not in agreement with the elements of the case plan. So, that is going to be an issue of the contested six-month review on September 18th." Consequently, the case plan review was continued, and the court did not adopt a case plan or order reunification services. But the father wanted to start drug and alcohol testing immediately in Washington State, so the court agreed he could use his own funds "to pay for the testing twice a week until Social Services funds can kick in." Then, he would be reimbursed for any "out-of-pocket expenses that he has when he starts testing this week." The court also granted de facto parent status to T.C.

Two weeks later, the father told Murphy he started drug testing twice a week on September 4. Murphy asked him to arrange for the test results to be sent to her. He also started parenting classes on September 5, and he was "concerned as to the appropriateness of the curriculum being covered" because the first class was about divorced parents. Murphy asked the father to send her the curriculum so she could decide whether the classes were appropriate. She also told him she would arrange his visitation with the child when he was in Orange County.

T.C. reported to Murphy that the child had not seen the occupational therapist for six weeks, but she had been "working with the child on techniques and exercises that [the occupational therapist had] demonstrated to her" Murphy provided a referral for developmental screening on September 21, and T.C. agreed to take the child. They also discussed the advisability of a neurological evaluation, and T.C. said she would get a referral for one from the child's pediatrician. T.C. reported the child exhibited increasing aggressive behaviors, walked on his tiptoes, and had "difficulty with textures." He recently had "a small 'staring spell'"

On September 18, 2007, the father, the paternal grandparents, the mother, the maternal grandparents, and T.C. were all present in court. The court was "in progress" on another matter, and the six-month review hearing was again continued to

October 22. Because the case had been lingering for so long, the new date was also designated as the 12-month review hearing. The father's counsel objected to the continuance and asked that the father be allowed to take the child to Washington State for a two-week visit, claiming he was a nonoffending parent. In response to the comments by the child's counsel that the father was being "adversarial," the father's counsel stated, "[T]he dad's not being adversarial by not signing his case plan. It was me who appeared on his behalf for a case plan review in which I would not stipulate to a case plan being ordered for him without a contested six-month review hearing. So, I'm ready to proceed on this six-month review hearing." The court allowed the father and his parents to have as much unmonitored visitation as possible during the few days they were in Orange County. The court signed an order for an expedited evaluation of the father's home in Washington State under the Interstate Compact on the Placement of Children (ICPC).

The mother argued the child should be removed from T.C.'s home because T.C. had posted pictures of herself and the child on her MySpace page. "[N]ot only does it violate the contract that the caretaker signed with the agency, but it's also very, very damaging to the child and to the child's family. Maternal grandmother works in the [same] school district that the caretaker does and has heard all sorts of information that people know about her daughter's drug problem, the father's apparent alcohol issues with a DUI. [¶] And all of this information has been publicized throughout the community . . . from the caretaker who is obligated to keep these matters confidential. . . . This behavior is damaging to the child and it's damaging to any potential reunification with the child and his parents." The mother acknowledged that none of the information to which she referred was in evidence. The court stated, "[E]verybody is very interested in the little boy. Some people might do things that aren't right. And that's probably one of those things that happened, so anything on the Internet is to be taken down. That's an order, but also give that information to the social worker and we'll see. [¶] . . . [W]e have a lot of people involved and we're all involved in what's

best for the little boy. Ultimately, I'm going to have to decide that. It's not going to be easy."

In the October 22, 2007 report, Murphy reported that the father had accompanied T.C. when she took the child to the doctor after court on September 18. The child had "a rash all over his body." T.C. said the doctor recommended Benadryl for the rash and "that the child's father not take the child to the beach as he had intended to." Nevertheless, T.C. reported, M.L. took the child to the beach and did not give him the Benadryl until 30 minutes before bringing him back home. He told T.C. he gave "the amount that was on the directions." The child was sleeping when he was returned home, and T.C. put him to bed without waking him. The next morning, she checked the child's diaper bag and "discovered that the child's father had purchased and given the child adult Benadryl, not children's Benadryl." T.C. contacted the poison control center and was told to "monitor the child closely for any reactions to said medication." The next morning, September 20, T.C. said the child had a seizure. "[H]is eyes began to flutter and roll back in his head and he began to twitch, lasting about twenty seconds. [The child] then reached for [T.C.] crying 'mama.'" T.C. took him to the emergency room, where the doctor "concluded that [the child] did have a seizure and needed to follow-up with a pediatric neurologist [The doctor] was unclear if the seizure was related to the Benadryl incident the previous [*sic*] day nor did he know if it was something to do with the rash"

Murphy also reported that T.C. had taken the child for an electroencephalogram (EEG) on September 28 but was unable "to fall completely asleep." The incomplete results did not indicate any abnormal brain activity, but T.C. said the child would need another EEG for complete results. The child had not had any more seizures. T.C. also reported the child had seen an ophthalmologist on October 4 because his eye was turning in. He was not prescribed glasses. During Murphy's monthly visit with the child, T.C. presented her with a "packet of information regarding

the child's father" which T.C. intended to give to the juvenile court. T.C. had compiled her observations and bits of information about the father implying he might not be the best placement for the child. She also included postings on MySpace pages belonging to the father and his friends, which indicated the father engaged in binge drinking, fighting, and inappropriate sexual behavior as recently as the first half of 2007.

The father had submitted results for three drug tests which were negative for drugs and alcohol. The mother had two positive drug tests in August but was otherwise complying with her case plan.

On October 22, the hearing was again continued to October 30 because there were widespread fires in Orange County and several of the attorneys could not get to court. The father and his parents were present, and SSA offered to arrange visitation while they were in Orange County. The mother's counsel complained that the maternal grandparents' visitation "has been cut short" and that Murphy had not been returning their calls. County counsel retorted "this is all bogus" and "made up by the mother." The court stated these issues would be put over to the continued date. "We're trying to accommodate everybody. Because, apparently, it's going to be a contentious hearing."

On October 30, 2007, Murphy filed a report detailing accusations between T.C. and the mother. T.C. claimed the mother was watching her house and was accompanying the maternal grandmother in the car with the child, which she was not allowed to do. The mother denied watching the house and told Murphy she had seen T.C.'s 12-year-old son walk the child to the park by himself for visits with the maternal grandmother. T.C. claimed she was following her son and the child in her car "for the entire walk." The mother complained she was not being informed of the child's medical appointments and she wanted to change the child's occupational therapist. Murphy decided changing therapists at this point would not be beneficial for the child because he had been with the same occupational therapist for "an extended period of time."

The combined six- and 12-month review hearings finally began on November 6 and continued over the next three months. SSA sought to prove that the child could not be returned to either parent, the mother had received reasonable services, the father had failed to obtain a case plan after he was found to be the presumed father, all services should be terminated, and the case should go to a permanent plan selection hearing. The father's position was that the child should be immediately returned to his care, SSA was obligated to provide him with services, he should receive additional services if the child was not immediately returned, and the child should be removed from T.C.'s home because she was interfering with reunification. The mother sought to prove the child should be immediately returned to her or she should receive additional services, and the child should be removed from T.C.'s home because she was interfering with reunification. T.C.'s position was that services should be terminated and the case should be referred to a permanent plan selection hearing, and that she was the best placement for the child. The child's position was that the case should be referred to a permanent plan selection hearing because both parents still posed a substantial risk of detriment to him if he were returned to them.

Social worker Murphy was cross-examined by all parties during the first three days of trial, November 6, 14, and 15. She testified the mother gave her M.L.'s name in February 2007. After he was found to be the presumed father, Murphy proposed a case plan, which included drug and alcohol testing, parenting classes, and a substance abuse program. She reviewed the case plan with the father. Although no services were actually ordered for the father, the court authorized funding for the testing and the parenting class, so Murphy believed SSA was obligated to provide those services. Murphy attempted to locate case plan services in Washington State, but the father was able to locate them himself before she was successful. She asked the father to arrange for the testing results to be sent to her, which he finally did, but not until October. He never sent her the curriculum for his parenting class as she had requested.

Murphy had received results from the father's testing for the months of September and October. He missed two tests in each month, but all of the actual tests were negative for drugs or alcohol. She did not know the status of the ICPC evaluation in Washington because she had not yet received any information back from the ICPC worker in SSA's office. Murphy reported the incident about the overdose of Benadryl on September 18 as it was relayed to her by T.C. Because she had been on vacation for three weeks, she had not had a chance to speak to the father or the paternal grandparents to get their versions of the event.

Murphy stated her concerns about placing the child in the care of the father were the father's "continued alcohol use, the . . . short period of time that we've been able to test him to make sure and decide whether he is clean or not and also his inability to follow doctor's orders in regards to giving the child medication and taking him to the beach when he was told not to." She admitted she was relying on T.C.'s version of the beach event. She was also concerned about the limited visitation between the father and the child.

Murphy testified the mother had completed a perinatal program. Although that program included a parenting component, Murphy recommended an additional parenting class. The perinatal program also included individual counseling, in which the mother successfully participated. The mother consistently visited the child and requested additional visits. But Murphy recommended termination of the mother's services because of her continuing positive drug tests.

Murphy testified that T.C. told her in May 2008 the child was having "small seizures"; Murphy did not contact the child's doctor, but "referred the caregiver to get a neurology evaluation for the child." An assessment was done in September. A few weeks later, T.C. reported the seizures had stopped. T.C. wanted to change the child's primary care physician; although the mother did not approve, Murphy allowed the change. T.C. also reported that she and the occupational therapist "felt that [the minor]

was overstimulated when he had too many visits with the grandmother and the mother” Murphy contacted the occupational therapist, who opined that one longer visit during the week would be less disorganizing and overstimulating than numerous visits during the week. Consequently, Murphy consolidated the existing visitation time into one weekly block. Subsequently, however, she discovered that the caregiver had not taken the minor to the occupational therapist for six weeks preceding the September SSA report.

Murphy submitted an update report to the court on November 14. She had met with the father on November 6 and asked him “about his alcohol consumption both past and present.” The father admitted he drank “on a regular basis” before he got the DUI, but he has cut back to one drink a month. He claimed he had ““changed my lifestyle”” from that portrayed on his MySpace pages. Murphy included copies of letters, written by the father’s employer and co-worker to his attorney, endorsing his good character. She also reported she had received three more drug test results for the father for dates in October; all were negative. She had received no test results for the mother.

The paternal grandmother testified she and her husband were prepared for the father and the child to move in with them. She insisted she gave the child the correct dose of Benadryl, explaining that she is a nurse and had been a pediatric nurse for about three years. The paternal grandmother testified the father told her he “might have a baby in California. And then he said that [the mother] was K[.], H[.]’s sister. We know H[.] well, her brother.” H. had moved to Washington State from California to live with his father, and he and M.L. went to high school together.

The father testified he learned he could be the father of the child “within somewhere between December [2006] to February [2007].” Sometime before August 2006, he found out from H., the mother’s brother, that the mother was pregnant. Then the mother called him, and he called the social worker, “I kept trying to contact her until I finally got ahold of her” The social worker told him she would set up a paternity

test, which took place in June. He had sexual relations with the mother on one occasion, in November 2005. He made no efforts to find out if she had become pregnant from the encounter. The father testified he “do[es] not drink that much anymore” since the DUI in July 2006. During the six months preceding his testimony, his pattern of drinking was to go out to a bar “usually maybe once” a week, “usually Saturday night.” He did not drink at home “because if I drink I go out to have a good time with friends, and I don’t drink at home because I think it’s boring.” He was willing to attend a substance abuse program, although he did not think he needed one because he was not an alcoholic.

On November 20, the court admitted into evidence five pictures of the father taken from his MySpace pages. The father testified the pictures were taken at the same time in October 2007 at a bar with his friends. They all drank alcohol; the father drank maybe “four or five beers.” It was the Saturday night before Halloween, and the father explained he “was just going out and celebrating and having fun.” He testified he “go[es] out and ha[s] a couple drinks once or twice a month” like the Halloween incident. The father acknowledged he had posted a comment on a MySpace page in October 2006 indicating he wanted to drink again when he was released from “house arrest.”

On November 28, Murphy submitted an update report to the court. She described her efforts on November 14 to obtain information about the status of the ICPC evaluation from a social worker in Washington State. The social worker called her back on November 27. He said he had not yet received fingerprint results from the father or from the paternal grandfather; neither had he received all three personal references for M.L. He hoped the ICPC evaluation would be completed by January 2008. Murphy had received two more negative results for the father’s tests in November. She had received no test results for the mother.

T.C. testified on November 28 and 29. Under cross-examination, she denied telling people in the community anything about the child’s parents. She described her observations of the child’s head banging, “lazy eye,” vomiting, and “little staring off

spells.” She denied having a teenage foster girl living with her during the time the child was living with her. She admitted she sometimes took the child to events where her older children were, but she denied subjecting him to overstimulation. She admitted putting pictures of the child on her MySpace page, along with pictures of her four children. She took them down the day she was ordered to do so. She testified she had an answering machine, but sometimes her children would “pick up messages, and they don’t turn it back on” She did not deliberately avoid answering calls from the father or the paternal grandmother. T.C. testified the father was present on September 18 when the doctor told them not to take the child to the beach or the park. She insisted she did not give the father and his family directions to the beach that day; the next day she gave them a stroller and directions to the harbor so they could walk the child around. She testified she cooperated with visits and tried to facilitate reunification.

The mother called a teenage girl who is a friend of T.C.’s daughter and lives across the street from the maternal grandmother. She testified she was at T.C.’s house and saw a girl who was staying there. T.C. told the witness the girl “needed help because . . . she had been raped or something like that by her dad. And she’s having family problems, so she needed a place to stay for a little bit.” The witness believed the child was living there at the time. The witness also saw T.C. with the child at high school track meets.

The mother called P.M., a receptionist at the school where T.C.’s son attends. The witness testified T.C. told her the child’s mother had drug issues and the father had alcohol issues. T.C. did not disclose the parents’ names. T.C. told the witness that she wanted to keep the child. The witness observed that T.C. was “really attached” to the child.

The mother called J.B., a mutual friend of T.C. and the maternal grandmother. The witness testified T.C. told her the child was the grandson of the maternal grandmother. She also told the witness he was a “drug baby” and no one was

visiting him in the hospital. Whenever the witness saw T.C. with the child, she always referred to herself as “mommy.” The mother also called L.T., an acquaintance of T.C., who testified she went to the hospital to help T.C. about four or five years ago when T.C.’s son was there after having a seizure. The doctors felt there was nothing wrong with the boy and did not want to admit him. T.C. demanded that tests be run on her son, but the doctors did not find anything wrong with him. Finally, the mother called C.B., a former good friend of T.C., who testified she saw T.C. jeopardize the child’s safety by placing him in the front seat of her car. C.B. also heard T.C. talking about the details of the child’s family.

Murphy submitted an update report to the court on December 17. She attended her monthly visit with T.C. and the child on December 7. The child “appeared happy and comfortable in his environment.” T.C. showed Murphy pictures she had found on the MySpace page belonging to a friend of the father. T.C. said the pictures had been taken the previous weekend and showed the father in a bar with his friends. Murphy was informed that the mother had missed two drug tests with the perinatal methadone clinic in November; she had not received any of the mother’s drug test results from LabCorp. Murphy had received two test results for the father from the last week in November; they were both negative for drugs and alcohol.

The maternal grandmother testified on December 20, 2007, and January 10, 2008. She testified when the child was detained, she contacted T.C. and asked her to be his foster parent. “As a family we wanted [the child] to stay close to home. And I had known of [T.C.] fostering before, and we called her and we asked. And when we met with her, she was like an angel from God, everything she said she was and what she would do.” Currently, however, the maternal grandmother had concerns about T.C. “She has lied to us from the beginning. She’s lied to the courts and she’s lied to social services. . . . We don’t really know what his medical condition is because we’ve never seen any medical records. . . . And then I hear . . . some stuff she says out to the

community” The maternal grandmother complained that the child was often dirty when they picked him up for visits. She also complained that the social worker would never call her back or “hear my side.”

The maternal grandmother had never witnessed the child having a seizure. “When he wakes up from his nap, . . . he’ll be staring . . . for a little bit. And I don’t know if it’s just that it’s Sunday, he’s . . . not used to waking up in the crib where he sleeps. . . . But I’ve not [seen] any seizure, rolling of the eyes, twitching, nothing like that.” She never witnessed any head banging or temper tantrums, but she has seen rashes on the child. “He’s had a lot of rashes.” The maternal grandmother felt that T.C. was interfering with reunification. “My visits were cut short because her children had sport activities and she couldn’t accommodate our visits any longer.” Twice T.C. failed to show up for a scheduled visit.

When the child was detained, the maternal grandmother wanted to take him into her home, but she had to choose between having the mother and having the child live there. She chose T.C. as a foster parent because T.C. said she would not try to adopt the child. The maternal grandmother was “angry” that T.C. now wanted to adopt.

Murphy submitted update reports to the court on January 14 and 16, 2008. She reported she met with the mother on December 18, 2007. The mother had recently begun testing at LabCorp. She had missed two parenting classes but was planning to make them up at the end of January. The mother told Murphy she had noticed bruises on the child’s arms on December 9. Murphy asked T.C. about the bruises on December 19, and T.C. said there were none. Murphy arranged visits for the father on January 9 and 11.

In mid-January, Murphy received results for seven tests taken by the mother in December and January. Of the seven tests, one was positive for morphine and four were positive for ethanol, which is found in alcohol. The mother denied drinking alcohol or taking drugs.

The occupational therapist testified she saw the child twice a week from December 2006 to August 2007. She did not see him for four months because she was not getting paid by the county. She resumed seeing him in December 2007. The child was referred to her by his pediatricians. When he first came to her, “[h]is ability to feed was very poor. . . . His ability to self-regulate, self-modulate and self-calm was extremely compromised.” Most of her conclusions were based on her own observation of the child. She observed him bang his head on the floor and “toe walk[.]” The occupational therapist testified the mother called in June 2007 and asked to attend the child’s appointments. The therapist was unsure whether the mother could attend, so she called Murphy “at least five times” to inquire, but Murphy never called her back.

The mother testified on January 17, 22, and 23, 2008. She said she started using heroin when she was 15 years old. She used drugs on and off, sometimes daily, until she became pregnant with the child. She stayed “clean” for several months, then started using heroin again in her ninth month of pregnancy. She began a methadone program through a clinic in Santa Ana two weeks before the child’s birth. The methadone program was recommended to her by people connected to the NA program, which she had been attending “for years.” The mother relapsed into using heroin in September 2006 and again in March and April 2007. She tested positive for cocaine in August 2007. Twice that same month she took someone else’s prescription pain pill, Oxycontin, and tested positive for morphine. She said she did not understand her more recent positive drug tests because she has not used drugs recently. She has been unable to wean herself off methadone.

The mother testified Murphy had not responded to her requests for the child’s medical records; out of five or six calls she made to Murphy in the last two weeks, only one was returned. She gave Murphy the father’s name and phone number in December 2006. The mother testified she was concerned about the child’s placement with T.C. “I have concerns for [T.C.’s] mental state, the things that she has done and said

to me, my family, to other people, the things she says to my son about me and my family, the fact that from the first day she brought him home she taught him she was his mother.”

The mother testified she gave the father’s name to Murphy in December 2006 or January 2007. Murphy told her she would be contacting the father for paternity testing. Between December 2006 and April 2007, the mother “spoke with [Murphy] on a monthly basis” and would ask her if she had spoken to the father, but she had not. The mother’s understanding was that “[t]hey just weren’t connecting for some reason”

Murphy testified again on January 24. She said she had been on vacation from December 21 to January 2. There were several messages from the mother during that time period, and Murphy called her back when she returned. Murphy told the mother she could get her visits increased and eventually receive overnight visits if she became fully compliant with her case plan. Murphy called “the lab to find out what would show up on the drug test as morphine.” She was told “[t]hat either codeine, morphine or heroin will show up.” The mother was referred to LabCorp on October 24, 2007; she did not start testing there until December 18, 2007.

On February 11, 2008, the juvenile court made its findings. It found that the child could not be returned to the mother within six months. “Really, it’s not really a close call here.” It found the father was “in a state of denial with his alcohol problem,” and consequently custody of the child could not be given to him at this point. The court noted there were only three weeks before the end of the 18 month deadline for services. “I think if I had six months . . . [the child] could be returned to you. I think you have an opportunity, and I think I see based on the evidence and your testimony and the circumstances where you’re living, I think in six months I think there is a substantial probability to return [the child] to you. . . . I think there’s a possibility once [the father] gets in a program, overcomes that denial I think he’s got a wake up call during that hearing.”

The court ruled against removing the child from his placement with T.C. “I haven’t heard any evidence that suggests that the caretaker at this point in time is a safety issue for [the minor]. There’s some evidence about the car seat, some evidence about she’s made some statements to people. But, realistically, . . . I don’t think there’s enough evidence to suggest that. I think there are red flags.”

The court then focused on whether the father was entitled to further reunification services. It first acknowledged SSA’s position that “unless the court finds that reasonable services were not offered to the parents, [the] court does not have discretion [to] offer services beyond the [18-month review hearing].” The court noted the social worker’s statement that in September 2007, she did not know the status of the ICPC because she forgot to call about it. It also noted the social worker was on vacation from September 26th to October 16th or 17th, 2007. It faulted the social worker for not contacting “this young father in Washington” from December 2006 to April 2007. The court noted it believed the father when he said “he’s calling much more than she’s returning calls. She did not go out of her way to contact this father who was making some inquiries.” The court continued, “[U]nder the circumstances of this case, I think he should have been contacted. And I think if that would have happened, I think in this case based on what I heard so far that we wouldn’t be here at this stage. [¶] . . . I believe she delegated her responsibility to the caretaker. . . . My finding with Miss Murphy is that she was an absent social worker. She allowed [T.C.] to dictate what’s going on.”

The court indicated his sympathy with the father and the paternal grandmother. “I do believe they were trying to do whatever they can. . . . He came down here. He followed his attorney’s advice. He did everything he could at that point in time. He came down here. It showed, his testimony, he deserves to have a chance with [T.]r.” The court concluded, “[U]nder these circumstances [services] were not reasonable as far as the father was concerned. And, therefore, the court’s going to give six more months of services to the father in this case.”

The court then turned its attention to the mother. “Now, the mother it’s a lot harder. A lot harder because I look at this, and I see six more months. I don’t see substantial probability, but I can’t disregard the fact of what the social worker did with the father. And there were some indications she didn’t return phone calls with mother, also. And it’s a closer call. Maybe I’m stretching it a little bit. But I’m going to find unreasonable services with the mom, also. So she’s going to get six more months. I don’t know what’s going to happen with the mom. I do believe that the father – and I want this ICPC to go through as soon as possible. I want him to get his act together, his move in with his mom. I know he’s working. And I want to see an alcohol program – a real stringent alcohol program. I want to see some overnights, and I want to see that started right away. The court set an 18-month review hearing for August 4, 2008.²

DISCUSSION

Appeal by the Father

The father first contends he was denied due process because he was not given the opportunity to participate in the dependency proceedings before August 2007. We disagree.

When the father’s name surfaced as a possible biological father in December 2006, he became an alleged father, i.e., “[a] man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status” (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) An alleged father is entitled to notice of the proceedings and an opportunity to appear and attempt to establish his paternity. (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) Murphy contacted the father in early April 2007 and asked him if he wanted a paternity test. When he said yes, she agreed to arrange it and asked the court for a paternity test order. The next day, she sent him notice of the six-month review hearing

² This court issued a stay of that hearing pending the resolution of these appeals.

scheduled for April 26. Although he did not appear at the hearing, the court authorized funds for the father to undergo paternity testing.

The three- to four-month delay between the time the social worker received the father's name and the time she contacted him, while regrettable, does not constitute a violation of due process. The father received notice of the proceedings, was advised of his rights, and was afforded an opportunity to be heard. Neither does the delay between April 26 and August 14 constitute a denial of due process. Murphy began the process of arranging an out-of-state paternity test in a timely manner, kept the father informed, and followed up to ensure it was completed.

“Due process is a flexible concept which depends upon the circumstances and a balancing of various factors.” (*In re Jeanette V.* (1998) 68 Cal.4th 811, 817.) It is true that SSA has a duty to identify and notify alleged fathers. (§ 361.2.) But once identified and notified, an alleged father bears some responsibility for advancing his rights. Alleged fathers are not entitled to reunification services or visitation. (*In re O. S.* (2002) 102 Cal.App.4th 1402, 1410.) Only presumed fathers have these rights, and it is an alleged father's burden to establish his status as a presumed father. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th at 570, 585-586.) The father knew he could be the child's father in December 2006 when the mother contacted him and explained the proceedings to him. “While under normal circumstances a father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response. Once a child is placed in that system, the father's failure to ascertain the child's existence and develop a parental relationship with that child must necessarily occur at the risk of ultimately losing any ‘opportunity to develop that biological connection into a full and enduring relationship.’ [Citation.]” (*In re Zacharia D., supra*, 6 Cal.4th at p. 452.)

The father next contends there is no substantial evidence to support the court's finding that placing the child with him would create a substantial risk of detriment. Again, we disagree.

At both the six-month review hearing and the 12-month review hearing, "the court shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.21, subd. (e).) The court found "there's just no way I can send [the child] back" to the father because "he has a serious alcohol problem." The record supports the court's determination.

The father testified he was intoxicated as recently as October 2007. He continued to drink regularly, notwithstanding his DUI in July 2006. There was evidence introduced that he indulged in excessive drinking frequently up to and around the time he received the DUI. Furthermore, he steadfastly denied he had ever had a problem with alcohol. Although he testified he no longer drank as much as before the DUI, the court was entitled to infer that his previous drinking patterns coupled with his current ones, together with his denial of an alcohol problem, constituted a serious alcohol problem that placed the child at risk.

Appeal by SSA and the Child

SSA and the child challenge the court's decision to give the parents six more months of services. They argue the finding that reasonable services had not been provided is not supported by substantial evidence. They further argue that even if the finding is supported by the record, the court could not extend services beyond the 18 month limit absent extraordinary circumstances, which are not present here. Finally, they argue that once the court found it could not return the child to the parents at the 18-month hearing, it was required to set a permanent plan selection hearing under section 366.26, notwithstanding the absence of reasonable services.

We address the final argument first. SSA and the child point to the language of section 366.22, subdivision (a): “[If] the child is not returned to a parent or legal guardian at the [18-month] review hearing, the court *shall* order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child. [¶] . . . The court *shall* determine whether reasonable services have been offered or provided to the parent or legal guardian.” (subd. (a), italics added.) Citing *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, they claim setting a hearing under section 366.26 is not conditioned on a finding of reasonable services. “[T]he finding [of reasonable services] is no longer a precondition to moving to the permanent placement stage.’ [Citation.]” (*Id.* at p. 1512.)³

SSA and the child base this argument on their assertion that the hearing was an 18-month review hearing. They are wrong. Reunification services are limited to a maximum period of 18 months from the date the child was originally removed from parental custody. (§ 361.5, subd. (a)(3).) If a 12-month review hearing is repeatedly continued so that it is commenced past the 18-month deadline, it will become an 18-month review hearing. (*Denny H. v. Superior Court, supra*, 131 Cal.App.4th at p. 1509; *In re Brian R.* (1991) 2 Cal.App.4th 904, 918; *In re Albert B.* (1989) 215 Cal.App.3d 361, 374, fn. 2.) Here, the hearing began three months before the end of the 18-month period following the minor’s detention and concluded one week before that date. Thus, the hearing was a combined six- and 12-month review. At such a hearing, if the court does not return the child to the physical custody of the parent, it must continue the case to an 18-month review hearing if it finds that reasonable services have not been provided to the parent. (§ 366.21, subdivisions (e), (f) and (g).)⁴

³ Other cases disagree with this line of reasoning. (See, e.g., *Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1164; *In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1214.)

⁴ Section 366.21, subdivision (e) provides in part: “At the review hearing held six months after the initial dispositional hearing, the court shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being

We now consider the question of reasonable services. Our review of the record leads us to conclude, as did the juvenile court, that reasonable services were not provided to the father. But our conclusion is not based on the social worker's lack of effort, as the court found; rather, it is based on the fact that the juvenile court never ordered a reunification plan requiring the father to participate in an alcohol abuse program.

The court's stated reasons for finding that the father did not receive reasonable services do not withstand scrutiny. After acknowledging that it needed to make such a finding in order to extend the father's reunification period beyond the remaining three weeks, the court faulted the social worker for failing to contact the father between December 2006 and April 2007. It also faulted the social worker for forgetting to ascertain the status of the ICPC report, going on vacation, failing to return the father's telephone calls in the Fall of 2007, forgetting whether the father asked for more visits, and allowing T.C. "to dictate what's going on."

None of these criticisms had anything to do with the reason the father failed to reunify with the child. The court refused to place the child with the father because it found he had a serious alcohol problem, was in serious denial about it, and needed to participate in an alcohol abuse program. But no such program had been ordered.

of the child. . . . [¶] . . . [¶] If . . . the court finds . . . that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing. . . ."

Section 366.21, subdivision (f) provides in part: "The permanency hearing shall be held no later than 12 months after the date the child entered foster care At the permanency hearing, the court shall determine the permanent plan for the child, which shall include a determination of whether the child will be returned to the child's home and, if so, when The court shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. . . . The court shall also determine whether reasonable services that were designed to aid the parent . . . to overcome the problems that led to the initial removal and continued custody of the child have been provided or offered to the parent"

Section 366.21, subdivision (g) provides in part: "If . . . a child is not returned to the custody of a parent . . . at the permanency hearing held pursuant to subdivision (f) [12-month review], the court shall do one of the following: [¶] (1) Continue the case for up to six months for a permanency review hearing, provided that the hearing shall occur within 18 months of the date the child was originally taken from the physical custody of his or her parent The court shall continue the case . . . if it finds that . . . reasonable services have not been provided to the parent"

As soon as the father was declared presumed, the court appointed him counsel and authorized funding for drug and alcohol testing. Two weeks later, SSA presented a proposed case plan to the father and the court, which included a substance abuse program. The father opposed the case plan, and its adoption was postponed. Nevertheless, funding for drug and alcohol testing was authorized, and the father began testing two weeks later.

The mother and father argue that Murphy did nothing to help the father reunify with the child. But the record does not support that assertion. Murphy monitored his test results and facilitated visits with the child whenever the father was able to travel from Washington State to Orange County. She maintained reasonable contact with him. After T.C. revealed the MySpace pages allegedly depicting the father's alcohol use, Murphy questioned him about his alcohol consumption "both past and present," reporting his explanations and denials in her report of November 14, 2007. She also included in her report letters on his behalf from his employer and co-worker.

The social worker cannot be faulted for the court's failure to adopt the proposed case plan. Neither can the father. True, he refused to stipulate to the proposed case plan at the case plan review hearing in August 2007, choosing instead to defer the issue to the six-month review hearing because he believed he was a nonoffending parent. But on the next date set for the six-month review hearing, September 18, the father argued against further continuances and stated he was ready to proceed. The subsequent continuances were for reasons beyond the father's control. Had the court adopted the proposed case plan, the father would have been offered services specifically designed to help him do exactly what he needed to do.

Contrary to the arguments made by SSA and the child, the juvenile court had discretion to extend services beyond February 17, 2008, the date marking 18 months from the child's removal from parental custody. At that time, section 361.5, subdivision (a) provided that reunification services shall not exceed "a period of six

months from the date the child entered foster care” for a child under the age of three years on the date of initial removal from the physical custody of his parents. (Former § 361.5, subd. (a)(2).) “[A] child shall be deemed to have entered foster care on the earlier of the date of the jurisdictional hearing . . . or . . . 60 days after [initial removal].” (Former § 361.5, subd. (a)(3).)⁵ But courts have exercised discretion to extend services past the 18-month deadline where “there were extraordinary circumstances” involving “some external factor which prevented the parent from participating in the case plan.” (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1388.)

In *In re David D.* (1994) 28 Cal.App.4th 941, the court found that reunification services beyond the 18-month limit were warranted where the juvenile court wrongly prohibited visitation between the mother and her children, thus failing to provide reasonable reunification services. (*Id.* at p. 953-955.) In *In re Daniel G.* (1994) 25 Cal.App.4th 1205, the juvenile court found the services provided to the mother were “a disgrace,” but ordered services terminated because it believed it did not have the authority to extend them beyond the 18-month date. The appellate court held the juvenile court had the discretion to do so. “We find nothing in the legislative intent or the specific language of sections 366.22 or 366.26 which prohibits the court from extending the period for reunification services beyond 18 months from the child’s detention where the agency responsible for providing these services has, in the court’s opinion, failed to make a reasonable effort to provide those services.” (*Id.* at pp. 1213-1214.)

In *In re Dino E.* (1992) 6 Cal.App.4th 1768, like this case, the juvenile court failed to adopt a reunification plan for the father. Although the father was referred to a parenting class, the juvenile court found that “[n]obody gave [the father] the map.

⁵ Section 361.5 was amended as of January 1, 2009 to provide that reunification services shall be provided for a child under three years at the time of removal from physical custody of his parents “during the period of time beginning with the dispositional hearing and ending with the date of the hearing set pursuant to subdivision (e) of Section 366.21 [six-month review hearing] . . .” (§ 361.5, subd. (a)(1)(B).) The definition of when a child is deemed to have entered foster care remains the same but has been moved to section 361.5, subdivision (a)(1)(C).

He needed some direction. It wasn't there.” (*Id.* at p. 1777.) Notwithstanding, the juvenile court ordered a selection and implementation hearing under section 366.26. The appellate court found the juvenile court had discretion to continue services beyond the 18-month deadline “where [it] was faced with the prospect that the 18 months had elapsed and no reunification plan had been developed for the parent” (*Id.* at p. 1778.)

Here, extraordinary circumstances are present that justify the extension of services to the father. The juvenile court found that the father had a “serious alcohol problem,” which he denied. But he was never ordered to participate in an alcohol abuse program or counseling to help him recognize and address the problem. “A reunification plan must be tailored to the particular individual and family, addressing the unique facts of that family.” (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 598.) In the context of this case, the failure to order these services deprived the father of reasonable reunification services.

But the juvenile court’s finding that the mother did not receive reasonable services is not supported by the record. The court acknowledged as much when it commented, “Maybe I’m stretching it a little bit.” It is clear the court gave the mother six more months of services not because it thought she was denied reasonable services or because it thought she had a substantial probability of reunifying with the child, but because it felt the social worker did not treat the father fairly. This was error.

Mother was provided reasonable services, and no extraordinary circumstances existed to justify extending them to her beyond the 18 month deadline. But when services are extended to one parent, the juvenile court has discretion to extend services to the other parent notwithstanding the other parent’s ineligibility for continued services. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 565-566.) We cannot say as a matter of law that the extension of services to the mother was an abuse of discretion. Furthermore, at this point, the services have already been provided to the mother and she

has already participated in them. As a practical matter, our reversal of the juvenile court's order would serve no purpose.

Appeal by the Maternal Grandmother

On January 10, 2008, the maternal grandmother filed a petition under section 388, seeking to remove the child from T.C.'s home and have him placed in her home or, alternatively, to increase her visits with the child. The maternal grandmother alleged T.C. "originally agreed that she would only *temporarily* care for the minor, but now she wants to adopt him and she is doing *anything* she can to separate the minor from his biological family." She claimed the child was "in imminent threat" of "both physical and emotional harm" in his current placement and should be placed with his biological family. The maternal grandmother attached her declaration; a declaration from the maternal grandfather; and a declaration from T.C.'s ex-husband, apparently filed in their divorce case, dated January 1997. She claimed T.C. had "made claims that [the child] is ill, has seizures, is autistic, has allergies, has a lazy eye, and has behavioural [*sic*] problems without medical documentation to support her claims. She has pos[t]ed information on the Internet, discussed this case with people in our community in an attempt to harm me and my relationship with [the child]. Further, I have had my visits reduced and social services will not discuss placing [the child] in my care and custody even though I have repeatedly expressed my desire to adopt [T.]."

T.C. filed opposition to the petition, attaching a current declaration from her ex-husband stating "Although [T.C.] and I had some difficulties during our divorce, we have since resolved them. I would be the first person to say, 'she is a wonderful, caring person and an exceptional mother.'" T.C. also attached letters from Hope 4 Kids, the foster family agency for whom T.C. worked. The letters explained it had weekly contact with T.C. and found no evidence of abuse or interference with reunification. In fact, it reported "some concern about the 'disrespect' that maternal grandmother was showing to [T.C.]," which had been witnessed by agency employees. The foster family

agency also explained that Christi M. had been placed in T.C.'s home for respite care but was removed four days before the child was placed there "because [T.C.] had made a prior commitment to [the maternal grandmother] that she would foster her grandchild."

The juvenile court stated it would consider the maternal grandmother's petition after the review hearing concluded. It did so on February 28, 2008 and found the petition failed to show a change of circumstances or that the requested order would be in the best interests of the child. "I have heard a lot on this case, a lot, . . . and I feel pretty confident. . . . I don't believe there's been a change of circumstances or new evidence in this case that I haven't heard before." The petition was denied without a hearing.

The maternal grandmother contends the juvenile court abused its discretion by summarily denying her petition without holding a hearing. Section 388 allows a parent to petition the juvenile court to change or modify a previous order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a).) The court must hold a hearing on the petition only "[i]f it appears that the best interests of the child may be promoted by the proposed change of order. . . ." (§ 388, subd. (d).) Thus, the petition must state a prima facie case of both changed circumstances and best interests of the child. "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

Although the petition should be liberally construed in favor of granting a hearing (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205), the juvenile court need not put blinders on when determining whether the required showing has been made. Rather, the court can consider the "entire factual and procedural history of the case" when evaluating the significance and strength of the allegations in the petition. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) We review the trial court's decision to deny a hearing for an abuse of discretion. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

We agree with the juvenile court that the petition did not state a prima facie case so as to justify a hearing. The issues of the child's placement were raised and fully litigated during the review hearing, which had concluded less than three weeks before. The juvenile court ruled that the child was in no harm in his current placement and moving him from the only home he had known was not advisable at this time. While the record is replete with accusations against T.C., there is substantial evidence to rebut them and support the juvenile court's decision. The summary denial was not an abuse of discretion.

DISPOSITION

The orders made at the six- and 12-month review hearing on February 11, 2008 are affirmed. The order summarily denying the maternal grandmother's section 388 petition on February 28, 2008 is affirmed. The stay of the 18-month review hearing is lifted, and the juvenile court is directed to hold the 18-month hearing as soon as practicable.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.